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No. 24

In the Supreme Court of the United States

OCTOBER TERM, 1954

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, EXECUTOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 2-11) are reported at 18 T. C. 836. The *per curiam* opinion of the Court of Appeals (R. 66) is reported at 207 F. 2d 600.

JURISDICTION

The judgment of the Court of Appeals was entered on November 6, 1953. (R. 67.) The petition for a writ of certiorari was filed February 3, 1954,

and was granted April 5, 1954. The jurisdiction of this Court rests upon 28 U. S. C. 1254.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

> SEC. 812. NET ESTATE.
>
> For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—
>
> * * * * *
>
> (d) *Transfers for Public, Charitable, and Religious Uses.*—The amount of all bequests, legacies, devises, or transfers * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * *. (26 U.S.C. 812.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

> SEC. 81.44 *Transfers for public, charitable, religious, etc., uses.*— * * *
>
> If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. Section 81.10 indicates the principles to be applied

in the computation of the present worth of deferred uses, but such computation will not be made by the Commissioner on behalf of the executor. Thus, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay or deliver the principal to the charitable corporation, or to apply it to a charitable purpose, the present value of the remainder is deductible. To determine the present value of such remainder, use the appropriate factor in column 3 of Table A or B of section 81.10. If the present worth of a remainder bequeathed for a charitable use is dependent upon the termination of more than one life, or in any other manner rendering inapplicable Table A or B of section 81.10, the claim for the deduction must be supported by a full statement, in duplicate, of the computation of the present worth made, in accordance with the principle set forth in section 81.10, by one skilled in actuarial computations.

* * * * *

SEC. 81.46 *Conditional bequests.*—If as of the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible. If an estate or interest has passed to or

is vested in charity at the time of decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable.

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

QUESTION PRESENTED

Whether, for the purpose of determining the net estate for estate tax purposes, the decedent's estate is entitled to a deduction under Section 812(d) of the Internal Revenue Code for contingent remainders to designated charities which will take effect only if the decedent's daughter, aged 27 at the decedent's death, dies without leaving issue or other descendants surviving her and her mother.

STATEMENT

The facts found by the Tax Court (R. 4-8) may be summarized as follows:

Louis Sternberger, the decedent, died on June 25, 1947. The executors of his estate filed a federal estate tax return disclosing a gross estate of $2,-

406,541.71. The gross estate consisted of certain assets which the decedent owned at the date of his death and other assets held in a revocable trust he had created on January 20, 1931, of which he was the primary life beneficiary. As of the date of the decedent's death, the dispositive provisions of the *inter vivos* trust (after a specific bequest of $5,000) were in all respects identical with the dispositive provisions of the residuary clause of the decedent's will. (R. 5.) In the estate tax return, the executors claimed a deduction of $179,154.19 as representing the alleged value of contingent charitable remainders provided for in the decedent's will and in the *inter vivos* trust of January 20, 1931. (R. 4-6.)

The will provided that the decedent's residuary estate is to be held in trust during the lives of the decedent's wife, Eunice E. Sternberger, and his daughter, Eunice P. Sternberger, and the survivor of them and, upon the death of the survivor, the principal is to be paid in equal shares to "the descendants then living" of his daughter, *per stirpes*, and, in the event there are none, one-half to certain collateral relatives of the decedent then living and one-half to certain charitable organizations. In the event no collateral relatives are then living, the entire principal is to be paid to the charitable organizations. (R. 5.)

The decedent's wife survived him and was 62 years of age at the date of his death. The decedent's daughter also survived him and was 27 years of age at the date of his death. She had been previously married and was divorced on March 31, 1944. At

the date of the decedent's death, she was unmarried and had had no children. (R. 6.)

At the Tax Court hearing, the executors of the decedent's estate introduced actuarial evidence designed to show the value of the contingent charitable remainders as of the decedent's death. This evidence consisted of computations based upon (1) the joint life expectancy of the decedent's wife and daughter, as determined from mortality tables, (2) the probability of the daughter's remarrying, as determined from the American Remarriage Table published by the Casualty Actuary Society, and (3) the probability of a child being born to the decedent's daughter, as determined from a table prepared by one of the testifying actuaries in accordance with accepted actuarial principles based upon data taken from the 1940 census. In making the computations, it was assumed that, if the decedent's daughter married and became the mother of a child, the child would survive her. It was also assumed that there would be someone in the group of collateral relatives who would be living at the deaths of the decedent's wife and daughter, so that not more than 50 per cent of the principal of the trusts would pass to the named charitable organizations. The computations resulted in a figure of $.24094 per dollar of trust corpus based on legitimate descendants of the daughter and of $.24058 including illegitimate children. (R. 6-8.)

The Tax Court held that the decedent's estate was entitled to a deduction under Section 812(d) of the Internal Revenue Code for the contingent

remainders to charity. The decision was based, first, upon an assumption that Section 812(d) allows a deduction for contingent remainders and, secondly, upon an acceptance of the actuarial computation of $.24058 per dollar of trust corpus as a reliable estimate of the value of the contingent remainders as of the decedent's death. (R. 8-11.) The Court of Appeals affirmed the Tax Court "on the authority of *Meierhof* v. *Higgins*, 129 Fed. (2) 1002 (C. A. 2)." (R. 66.)

SUMMARY OF ARGUMENT

The decision below, which holds that the contingent charitable remainders created by the decedent are deductible under Section 812(d) of the Internal Revenue Code, is contrary to the pertinent Treasury Regulations, which are valid, and is inconsistent with prior interpretations of the Internal Revenue Code. The deduction was apparently allowed by the court below on the theory that Section 812(d) allows a deduction for contingent charitable transfers which can be valued as of the decedent's death, whereas it has previously been held that the deduction is not allowable for any charitable bequest which is contingent as of the decedent's death. The court below apparently confused the rule denying a deduction for a vested charitable remainder where the value of the interest is too indefinite for reliable appraisal with the companion, and sometimes overlapping, rule that there may be no deduction for a contingent gift whether it is subject to accurate valuation or

not. In short, a bequest of a future interest to a charity is not deductible simply because it can be valued; it must also be shown that the possibility that charity will not ultimately take is so remote as to be negligible.

1. Section 812(d) of the Code provides that there shall be deducted from the gross estate "the amount of all bequests * * * to * * * any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes." This provision is implemented by Section 81.44 of Treasury Regulations 105 providing for allowance of a deduction of the value, at the decedent's death, of a charitable remainder under a trust created for both a charitable and private purpose, as when a charitable bequest is preceded by a life estate. In contrast, the first paragraph of Section 81.46, entitled "Conditional bequests", provides that no deduction is allowable for a bequest which is conditional as of the decedent's death, unless the possibility that charity will not take is so remote as to be negligible. Section 81.46 of Treasury Regulations 105 was promulgated in 1942. Prior to 1942 the substance of both that section and Section 81.44 had been contained in all of the Treasury Regulations since 1919. The denial of a deduction for conditional bequests is reasonable and consistent with Section 812(d) of the Code, which in terms uses language of outright transfer in allowing the deduction of "The amount of all bequests * * *" to and for charitable uses.

The first paragraph of Section 81.46 of Treasury

Regulations 105 is therefore valid and to be given controlling effect. Indeed, its validity appears to have been already established by *Merchants Bank* v. *Commissioner*, 320 U. S. 256, where this Court approved the distinction drawn in the Regulations between a testator who dilutes his philanthropy by a partial distribution to non-charitable purposes and one who hedges his philanthropy by conditioning the gift. In that case the Court upheld the validity of, and applied, the second paragraph of the prior regulation, comparable to the one here involved, entitled "Conditional bequests", under which deduction, in the case of a gift of property or of a fund which is subject to diversion to a private use, is limited to the portion, if any, of the property or fund which is exempt from an exercise of the power. The validity of the first paragraph of Section 81.46 of Treasury Regulations 105 was specifically upheld by the First Circuit in *Newton Trust Co.* v. *Commissioner*, 160 F. 2d 175. In other cases the regulation has been applied on the assumption that it is valid.

The court below, in effect, held the first paragraph of Section 81.46 of Treasury Regulations 105 to be invalid on the authority of its earlier decision in *Meierhof* v. *Higgins*, 129 F. 2d 1002. In that case the court below refused to apply the prior regulation entitled "Conditional bequests" on the ground that it should be read together with the regulation relating to bequests for both a charitable and private purpose, which the court interpreted as allowing deduction for a conditional be-

quest. This Court's *Merchants Bank* decision reflects the incorrectness of such an interpretation of the Regulations.

The first paragraph of Section 81.46 of Treasury Regulations 105 clearly precludes deduction for the contingent charitable bequests here involved. The designated charities' right to take was contingent upon the failure of the decedent's daughter (aged 27 at the decedent's death) to leave issue or other descendants surviving her and her mother. Even according to the actuarial computation submitted in evidence, which resulted in a percentage figure as to the charities' chances of taking, the odds were three-to-one that the charities would not take. This is plainly not a case where the possibility that charity will not take is so remote as to be negligible.

2. The decision below is contrary to the consistent holding that deduction is not allowed for contingent bequests. In early pertinent decisions this Court indicated that the deductibility of charitable bequests depends upon the certainty of receipt by the charity, and *Merchants Bank* implicitly held that the deduction may not be allowed for a contingent bequest, regardless of whether it can be valued as of the decedent's death. On the basis of those decisions, the lower courts have repeatedly denied a deduction for conditional charitable bequests on the ground that Section 812 (d) of the Code and its predecessors allow a deduction only for charitable bequests under which the charity is certain to take. *Meierhof* and one district court de-

cision are exceptions, but the allowance of the deduction in *Meierhof* was even contrary to the statement in a prior decision of the same court, the court below, that no deduction is allowed for a charitable bequest which at the time of the decedent's death is contingent and uncertain ever to take effect.

3. Even if the deductibility of contingent charitable bequests depended upon whether the market value of the bequest could be ascertained as of the decedent's death, as the court below held in *Meierhof*, it would still be clear that no deduction is allowable for the instant contingent remainders. The actuarial computation accepted by the Tax Court and the court below, being based on probabilities built on probabilities, represented merely an arbitrary guess as to the charities' chances of taking. This Court long ago held in *Humes* v. *United States*, 276 U. S. 487, that an actuarial computation representing only a guess as to the value of a charitable remainder does not afford a basis for a charitable bequest deduction.

ARGUMENT

The Decedent's Estate Is Not Entitled to a Deduction Under Section 812(d) of the Internal Revenue Code For the Contingent Charitable Remainders

For the purpose of computing a decedent's net estate for estate tax purposes, Section 812(d) of the Internal Revenue Code, *supra*, p. 2, allows a deduction for the amount of charitable bequests, legacies, devises, or transfers. In the present case

the decedent, in a revocable *inter vivos* trust and in a trust created by his will, provided for *contingent* remainders to designated charities (which will be referred to as bequests) under which the charities will take one-half of the trust principal only if the decedent's daughter (aged 27 at the decedent's death) dies without leaving issue or other descendants surviving her and her mother.[1] The Tax Court's holding that the estate is entitled to a deduction under Section 812(d) for such contingent remainders was based upon an assumption that *contingent* bequests are deductible and on an acceptance of an actuarial computation as a reliable estimate of the value of the contingent remainders as of the decedent's death. (R. 8-11.) The Court of Appeals affirmed the Tax Court in a *per curiam* opinion "on the authority of *Meierhof* v. *Higgins*, 129 Fed. (2) 1002 (C. A. 2)" (R. 66), a decision of the same court upholding deduction of the actuarial value of a contingent remainder to Columbia University which would be defeated altogether if the decedent's widow survived the decedent's sister and the sister's husband. By reference to *Meierhof*, it appears that the decision be-

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[1] The trusts also provided for contingent remainders to the charities as to the other half of the trust principal, contingent not only upon the failure of the decedent's daughter to leave issue or other descendants surviving her and her mother but on the failure of certain collateral relatives of the decedent to survive the daughter and mother. Taxpayer has in effect conceded that no deduction is allowable in respect of this half of the contingent charitable remainders. See footnote 27, *infra*, p. 37.

low was based on the theory that deduction is allowable for a contingent remainder, equally with any other future interest, if "it has an ascertainable market value" (p. 1006). In contrast with this holding, the pertinent Treasury Regulations and decisions other than *Meierhof* deny a deduction with respect to *any* bequest which is contingent as of the decedent's death.[2]

A. *The charitable remainders, being contingent, are not deductible under the pertinent Treasury Regulations.*

1. *The first paragraph of Section 81.46 of Treasury Regulations 105 validly provides that no deduction is allowable for a transfer to charity which is conditional as of the decedent's death, unless the possibility that charity will not take is so remote as to be negligible.*

In *Merchants Bank* v. *Commissioner*, 320 U. S. 256, where a charitable bequest deduction was de-

[2] The Commissioner's deficiency determination was based on the ground that "their [the bequests'] actual present value cannot be determined by any known data" (R. 4). In the Court of Appeals the government's principal argument was that no deduction is allowable for gifts to charity which are contingent. Since the burden was on the taxpayer to sustain the validity of the deductions on all grounds, the court of appeals was free to consider the argument before it even though it had not been presented to the Tax Court in that form. *Hormel* v. *Helvering*, 312 U. S. 552; *Helvering* v. *Richter*, 312 U. S. 561. The court below apparently considered the government's position on its merits since the *per curiam* decision does not indicate the contrary.

nied in respect of a charitable remainder of a trust corpus which was subject to invasion in favor of the life tenant, the Court had occasion to refer to the predecessor of Section 812 (d) of the Code which used the same language as the present section and to the Regulations which preceded those involved in the present case. The Court there recognized (p. 259) that in the statute, under which the deduction is in terms allowed for the "amount" of all charitable bequests, Congress used "the language of outright transfer" but—

> apparently envisaged deductions in some circumstances where contingencies, not resolved at the testator's death, create the possibility that only a calculable portion of the bequest may reach ultimately its charitable destination.

for example, "the not unusual case of a bequest of income for life intervening between the testator and the charity" (*ibid.*, fn. 6). As the Court further stated in *Merchants Bank* (pp. 259-260)—

> The Treasury has long accommodated the administration of the section to the narrow leeway thus allowed to charitable donors who wish to combine some private benefaction with their charitable gifts. The limit of permissible contingencies has been blocked out in a more convenient administrative form in Treasury Regulations * * *.

Those limitations are now contained in Sections 81.44 and 81.46 of Treasury Regulations 105, *supra*,

pp. 2-4. Section 81.44, the substance of which has been contained in all of the estate tax Regulations since 1919,[3] relates to the creation of a trust "for both a charitable and a private purpose" and permits deduction of the actuarial value of the beneficial interest in favor of the charitable purpose but—

> only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. * * * Thus, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay or deliver the principal to the charitable corporation, or to apply it to a charitable purpose, the present value of the remainder is deductible. * * *

Section 81.46 of Treasury Regulations 105 is entitled "Conditional bequests" and was preceded by Regulations which from 1921 to 1942 contained the following identical language, except that one of the Regulations commences with the word "If":[4]

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[3] See Article 53 of Treasury Regulations 37 (Revised, 1919 ed.), promulgated under the Revenue Act of 1918; Article 48, Treasury Regulations 63, promulgated under the Revenue Act of 1921; Article 45, Treasury Regulations 68, promulgated under the Revenue Act of 1924; Article 44, Treasury Regulations 70 (1926 and 1929 eds.), promulgated under the Revenue Act of 1926; and Article 44, Treasury Regulations 80 (1934 and 1937 eds.), promulgated under the Revenue Acts of 1926 and 1932.

[4] See Article 56, Treasury Regulations 63, and Article 47 of Treasury Regulations 68, 70 (1926 and 1929 eds.), and 80 (1934 and 1937 eds.).

The earlier Regulations, Article 56 of Treasury Regulations 37 (Revised, 1919, and Revised January, 1921 eds.), promul-

Conditional bequests.—Where the transfer is dependent upon the performance of some act or the happening of some event in order to become effective, it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed.

Where the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

In 1942, the first paragraph of the regulation covering "Conditional bequests" was changed to its present form in Section 81.46 of Treasury Regulations 105, which is as follows:[5]

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gated under the Revenue Act of 1918, contained a provision "Conditional bequests" which was similar to the first paragraph of the above Regulations but did not contain the second paragraph.

[5] The change in this paragraph, making allowance for a case in which the possibility of charity not taking is so remote as to be negligible, was apparently made in recognition of cases (see, e.g., *United States* v. *Provident Trust Co.*, 291 U. S. 272; *Farrington* v. *Commissioner*, 30 F. 2d 915 (C. A. 1st), certiorari denied, 279 U. S. 873; *Ninth Bank & Trust Co.* v. *United States*, 15 F. Supp. 951 (E. D. Pa.)) involving charitable bequests contingent upon the death of a life tenant without issue where, because of the age of the life tenant at the

> Sec. 81.46 *Conditional bequests.*—If as of the date of decedent's death the transfer to charity is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that charity will not take is so remote as to be negligible. If an estate or interest has passed to or is vested in charity at the time of decedent's death and such right or interest would be defeated by the performance of some act or the happening of some event which appeared to have been highly improbable at the time of decedent's death, the deduction is allowable.

Under the Regulations, therefore, deductibility in the case of charitable remainders is based on certainty of receipt by the charity and, as this Court stated in *Merchants Bank* (p. 261), on a highly reliable appraisal "of the amount the charity will receive." On the one hand, the Regulations allow the deduction for the value at the decedent's death of the amount the charity is unconditionally entitled to receive in the future, if its value can be ascertained. On the other hand, the Regulations provide, in clear and unmistakable language, that no deduction is allowable for any bequest which is conditional as of the decedent's death. Thus, if at the time of

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time of the decedent's death, a prior operation, or medical testimony relating to the life tenant's physical condition as of the decedent's death, the possibility of her having issue was practically non-existent.

the decedent's death it is not certain that charity will receive anything, as under a contingent remainder, the deduction is not allowed and it is immaterial whether the contingent charitable interest as such can be valued as of the decedent's death.

The first paragraph of Section 81.46 of Treasury Regulations 105, directly involved here, is clearly valid. That paragraph, which has been in effect since 1942, states that the deduction is not allowable for a bequest which is conditional as of the decedent's death, unless the possibility that charity will not take is so remote as to be negligible. The interpretation of Section 812 (d) of the Code and its predecessors in the Regulations as not permitting the deduction of conditional bequests dates back to 1921, as we have already shown, *supra*, p. 15. The present statutory language, in terms allowing the deduction for "The amount of all bequests * * *" to and for charitable uses, is the original statutory language used by Congress when it first authorized deduction of charitable bequests in Section 403 (a)(3) of the Revenue Act of 1918, c. 18, 40 Stat. 1057. Since the quoted statutory language has been repeatedly reenacted by Congress with presumed knowledge of the interpretation given that language by the Regulations, the Regulations may be deemed to have received the implied approval of Congress and to have the force and effect of law. *Helvering* v. *Winmill*, 305 U. S. 79; *Taft* v. *Commissioner*, 304 U. S. 351; *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459. In any event, as was stated in *Commissioner* v. *South Texas Co.*, 333 U. S. 496, 501:

> This Court has many times declared that Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes and that they constitute contemporaneous constructions by those charged with administration of these statutes which should not be overruled except for weighty reasons. See, e.g., *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378.

Since Section 812 (d) of the Code uses "the language of outright transfer" (*Merchants Bank*, p. 259) in allowing the deduction of bequests for charitable uses, the regulation's interpretation of the statute as not permitting the deduction of conditional bequests is reasonable and consistent with the statute and should therefore be sustained.

Indeed, the validity of the first paragraph of Section 81.46 of Treasury Regulations 105 appears already to have been established by *Merchants Bank*. That case involved the question whether a deduction was allowable in respect of a charitable remainder of trust corpus which was subject to invasion for the comfort, support, maintenance, and or happiness of the decedent's wife, the life tenant. Because of the power of invasion, the case specifically involved the *second* paragraph of Article 47 of Treasury Regulations 80, promulgated under the Revenue Acts of 1926 and 1932, the article covering "Conditional bequests" (identical with the second paragraph of the present Section 81.46 of Treasury Regulations 105, quoted *supra*, p. 4). That second paragraph provided that in

the case of a gift of property or of a fund which is subject to diversion to a private use, the deduction is limited to the portion, if any, of the property or fund which is exempt from an exercise of the power. Thus, in line with the first paragraph, this second paragraph of Article 47 drew a distinction between the conditional and unconditional parts of a charitable bequest and provided for disallowance of the deduction to the extent the charitable bequest was conditional. In its decision this Court stated that under the statute a "narrow leeway" is allowed to charitable donors who wish to combine some private benefaction with their charitable gifts, that "The limit of permissible contingencies has been blocked out" in convenient administrative form in the Regulations, and that (p. 260)—

> These Regulations are appropriate implementations of § 303 (a)(3) [now Section 812 (d) of the Code], and, having been in effect under successive reenactments of that provision, define the framework of the inquiry in cases of this sort. Cf. *Helvering* v. *Winmill*, 305 U. S. 79; *Toft* v. *Commissioner*, 304 U. S. 351.

The Court expressly approved of the distinction drawn in the Regulations between a testator "who dilutes his charity only to the extent of first affording specific private legatees the usufruct of his property for a fixed period" and a testator who "hedges his philanthropy" and permits invasion of the corpus for private legatees. (P. 260.) The Court also interpreted and applied the Regulations as requiring that for a deduction a highly reliable

appraisal of "the amount the charity will receive" must be available and made at the death of the testator. (P. 261.) Denial of the deduction followed from the fact that the power of invasion, not being limited by reference to readily ascertainable and reliably predictable facts, extended to the entire trust corpus, as distinguished from only a calculable part of it, and made it impossible to compute "what the charity will receive" (p. 262), with the result that the charitable gift was completely conditional.

Henslee v. *Union Planters Bank*, 335 U. S. 595, which involved the second paragraph of Section 81.46 of Treasury Regulations 105 (the regulation here in issue) and, like *Merchants Bank*, the question whether a charitable bequest deduction was allowable in respect of a charitable remainder of trust corpus subject to invasion for a private purpose, points up the fact that it is the conditional nature of the charitable bequest which precludes deduction. In its decision the Court specifically stated (p. 599) that the "chance" of invasion—a "contingency which would have diminished or destroyed the charitable interest"—precluded the deduction.

Merchants Bank (as well as *Union Planters Bank*) thus accepted and applied the theory, as reflected in the Regulations, that no deduction is allowable under Section 812 (d) for a bequest which is conditional as of the decedent's death. Acceptance of that theory in connection with the application of the *second* paragraph of the regulation entitled "Conditional bequests" is strong support for

the validity of the *first* paragraph of the present regulation. (Section 81.46 of Treasury Regulations 105).

In the cases in which the courts have had occasion to consider the first paragraph of Section 81.46 of Treasury Regulations 105, the regulation has been either held, or assumed to be, valid. It was specifically held to be valid and applied by the First Circuit in *Newton Trust Co.* v. *Commissioner*, 160 F. 2d 175. It was assumed to be valid and applied in *Graff* v. *Smith*, 100 F. Supp. 42 (E. D. Pa.), and in *Churchill* v. *United States*, 68 F. Supp. 267 (E. D. Wis.). It was also assumed to be valid by the Fifth Circuit in *Allen* v. *First Nat. Bank of Atlanta*, 169 F. 2d 221, but held to be inapplicable to the facts of that case.

Newton Trust Co., in which the regulation was specifically held to be valid, involved a bequest of a charitable remainder of trust corpus subject to a power of invasion in favor of the decedent's widow. After holding that *Merchants Bank* was applicable because the power of invasion was not limited by any fixed standard and thus did not lend itself to a reliable determination of the amount the charity would ultimately receive, the First Circuit discussed the further argument of the taxpayer that a charitable bequest deduction was allowable on the ground that the power of invasion, because of the terms of the trust under which the property was held, could not be exercised in favor of the decedent's widow until the death of the decedent's brother. The taxpayer argued

that, assuming the death of the decedent's brother prior to the decedent's widow would defeat the deductibility of the charitable interest since it would bring into effect the power of invasion, the charity would take the entire corpus if the widow predeceased the brother. The taxpayer suggested that the point in issue could be stated as "a trust to pay the income to A for life and upon the death of A remainder to B, if B survives A, and if B does not survive A then over to charity" (p. 180) and that the value of this contingent remainder could be valued actuarially on the basis of a 50 per cent factor resulting from the use of mortality tables. In answering the argument (pp. 180-182), the First Circuit stated that it had no hesitation in saying that the value of the contingent charitable bequest may be mathematically or actuarially computed, but that under Section 81.46 of Treasury Regulations 105 no deduction is allowable for the contingent bequest and "We * * * find no reason for denying the validity of the Regulation" (p. 182).

The court below, in effect, held the first paragraph of Section 81.46 of Treasury Regulation 105 to be invalid on authority of its own prior decision in *Meierhof* v. *Higgins*, 129 F. 2d 1002, and gave no recognition to the Government's argument that *Meierhof* was inconsistent with this Court's more recent decision in the *Merchants Bank* case. In *Meierhof* the court below allowed deduction of the actuarial value of a contingent remainder to Columbia University which would be defeated alto-

gether if the decedent's widow survived the decedent's sister and the sister's husband.[6] That case involved the same Regulations (Articles 44 and 47 of Treasury Regulations 80) later dealt with in *Merchants Bank*. Those Regulations, as we have already indicated, were in substance the same as the present Sections 81.44 and 81.46 of Treasury Regulations 105.[7] Instead of applying Article 47 of Treasury Regulations 80 in *Meierhof*, the court below stated that contingent remainders like the one to Columbia University have long been valued for purposes of taxation (p. 1004) and that Article 47 should be read in connection with Article 44, which related to trusts created for both a charitable and a private purpose (p. 1005). In answer to the Government's argument that Article 44 applied to a trust for both a charitable and private purpose while Meierhof's will created a trust in the alternative, the court stated that it saw no reason for construing the words "for both charitable

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[6] As to one-half of the trust corpus, the charitable remainder was contingent upon the failure of the decedent's widow to survive the decedent's sister; as to the other half, the charitable remainder was conditional on the failure of the decedent's widow to survive both the decedent's sister and the sister's husband.

[7] The first paragraph of Article 47 differed slightly from the present Section 81.46 of Treasury Regulations 105, reading as follows:

> Art. 47. *Conditional bequests.*—If the transfer is dependent upon the performance of some act or the happening of some event in order to become effective, it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed.

and private purposes" as precluding the deduction of conditional trust bequests. (P. 1005).[8] *Merchants Bank* plainly reflects that such a construction of the Regulations is erroneous, for in that case the Court indicated (p. 260) that Article 44 of Treasury Regulations 80 (and thus the present Section 81.44 of Treasury Regulations 105) applies only to—

> the bequest of the testator who dilutes his charity only to the extent of first affording specific private legatees the usufruct of his property for a fixed period, * * *.

and stated that "a different problem is presented" by the testator who "hedges his philanthropy" (p. 260). While both *Meierhof* and the present case involve the application of comparable regulations to contingent charitable gifts, the opinion of this Court in *Merchants Bank* required an overruling of the earlier case.

2. *The first paragraph of Section 81.46 of Treasury Regulations 105 does not permit a deduction in this case*

Under the first paragraph of Section 81.46 of Treasury Regulations 105 no deduction is allowable for a charitable bequest which is conditional

[8] The holding that the deduction was allowable for a conditional bequest was contrary to the overwhelming weight of authority, including prior decisions of the court below, as we show later. In *Newton Trust Co. v. Commissioner*, *supra*, the First Circuit expressly refused (pp. 181-182) to follow the *Meierhof* interpretation of the Regulations.

as of the decedent's death, unless the possibility that charity will not take is so remote as to be negligible.[9] The present case involves contingent charitable remainders under which the designated charities will take only if the decedent's daughter dies without leaving issue or other descendants surviving her and her mother. The daughter was 27 years of age at the decedent's death. She was then unmarried but had previously been married and divorced without issue. A woman 27 years of age, in good health, and capable of childbearing is obviously likely to have issue and other descendants who survive her and her mother. Even the actuarial computation accepted by the Tax Court and the court below estimated the value of the contingent remainders as being only $.24058 per dollar of corpus. The actuarial computation, being based on life expectancy, remarriage probabilities, and the chances of issue, was, as the Tax Court recognized (R. 8), only an *estimate* of value. It was the type of valuation urged in the *Newton Trust Co.* case—"a percentage figure" (R. 26) representing the charities' chances of taking all or nothing, not the present value of what they were certain to receive—and reflected that there was a three-to-one

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[9] As already indicated (fn. 5, supra, p. 16), it appears that the provision for allowance of the deduction in the case of a conditional bequest under which the possibility of charity not taking is so remote as to be negligible was apparently in recognition of decisions, including a decision of this Court (*United States* v. *Provident Trust Co.*, 291 U. S. 272), in which the deduction was allowed for a contingent charitable bequest where the contingency was as a practical matter non-existent

possibility that the charities would *not* take. That of course was not a "negligible" possibility. It therefore follows that the Regulations preclude a deduction in respect of the contingent remainders to charity and that the decision below is incorrect.

B. *Apart from the regulations now applicable, the decisions hold that contingent charitable bequests are not deductible.*

The decision below, allowing a deduction under Section 812 (d) of the Code for conditional charitable transfers, is contrary to the overwhelming weight of authority. Even aside from the validity and applicability of the first paragraph of Section 81.46 of Treasury Regulations 105, the lower courts, on the basis of decisions of this Court, have for the most part never considered conditional bequests to be deductible, regardless of whether in a given case the contingent interest as such could be valued as of the decedent's death.

Three cases involving the deductibility of conditional charitable bequests were decided by this Court prior to *Merchants Bank*. In *Humes v. United States*, 276 U. S. 487, deduction was denied in respect of a contingent charitable bequest under which charities would take trust remainders if the decedent's niece (15 years of age and unmarried at the decedent's death) should die without issue before attaining the age of 40. It was there contended that the actual value of the contingent remainders at the decedent's death could be computed from certain data, but the Court stated that a computation

of value on the basis of such data was "mere speculation bearing the delusive appearance of accuracy" and that the fundamental question was "not whether this contingent interest can be insured against or its value guessed at, but what construction shall be given to a statute". (P. 494.) On the record in that case the deduction could have been denied either on the ground that the bequest was not subject to valuation or on the ground of contingency. However, in *Ithaca Trust Co.* v. *United States*, 279 U. S. 151, which involved charitable remainders of trust corpus subject to invasion for a private purpose, *Humes* was cited in support of a statement that the question was whether the provision for invasion of the trust corpus made the gifts to charity "so uncertain" that deduction of the "amount of those gifts" could not be allowed. (P. 154.) In *Ithaca Trust Co.* it was held that a deduction was allowable because the bequest was not conditional to the extent of a calculable part of the trust corpus which under the terms of the gift was free from the danger of invasion.[10] *United States* v. *Provident Trust Co.*, 291 U. S. 272, involved deductibility in respect of a contingent remainder under which charities would take if the decedent's daughter died without issue. At the decedent's death the daughter was 50 years of age, had no issue, and had had an operation which rendered her incapable of giving birth to a child. De-

[10]A comparable situation is similarly treated in a recent ruling of the Internal Revenue Service. Rev. Rul. 54-285, Int. Rev. Bul. July 19, 1954, p. 5.

duction for the remainder interest was allowed because (p. 286)—

> the birth of a child to the daughter of the deceased after his death was so plainly impossible that, as a practical matter, the hazard disappears from the problem.

In other words, the charitable bequest was contingent only in form, not in practical effect.[11]

The Court's more recent *Merchants Bank* and *Union Planters Bank* decisions made it even clearer that denial of the deduction for conditional charitable bequests results from the conditional nature of the bequests, not from inability to value the contingent charitable interest as such. In both of those cases the charitable remainders of trust corpus were conditional in the sense that charity would receive only that trust corpus not diverted to the use of the life tenant through a power to invade the corpus. In *Merchants Bank* the Court stated (p. 261) that deductibility must rest on a highly reliable appraisal "of the amount the charity *will* receive" (emphasis added). In *Union Planters Bank*, where the charitable remainder of trust corpus was subject to invasion in favor of the decedent's mother, the Court stated (pp. 599-600):

> We do not overlook the unlikelihood that a woman of the mother's age and circumstances

[11] Section 81.46 of Treasury Regulations 105 makes allowance for the deduction in such a case by providing that conditional charitable bequests are not deductible "unless the possibility that charity will not take is so remote as to be negligible."

> would abandon her customary frugality and squander her son's wealth. But, though there may have been little chance of that extravagance which would waste a part or consume the whole of the charitable interest, that chance remained. * * * The contingency which would have diminished or destroyed the charitable interest here considered might well have been insured against, but such an arithmetic generalization of experience would not have made this charitable interest "presently ascertainable" [quoting from *Humes* v. *United States*, 276 U. S. 487, 494]. "Rough guesses, approximations, or even the relatively accurate valuations on which the market place might be willing to act are not sufficient." *Merchants Bank* v. *Commissioner, supra* at 261.

Thus, these decisions clearly hold that the deduction is allowed only for the value at the decedent's death (usually called "present value") of the amount charity *will* receive and that it is immaterial whether the charity's contingent possibility of receipt can be valued as of the decedent's death.[12]

Applying the decisions of this Court, the lower

[12] It may be noted that in the *Merchants Bank* and *Union Planters Bank* cases it was quite likely that the charities would receive at least some amount, whereas in the present case, where the charities' right to receive anything was contingent upon the failure of a woman 27 years of age to leave issue or other descendants surviving her and her mother, there was a three-to-one chance against the charities' taking anything (see *supra*, pp. 6-7) and a determination of whether the charities would *actually* take was "as far beyond the reach of an

courts, including both the court below and the Tax Court until their decisions in the present case, have repeatedly held that conditional charitable bequests are not deductible under Section 812 (d) of the Code and its predecessors.[12] See *Newton Trust Co.* v. *Commissioner*, *supra*; *Burdick* v. *Commissioner*, 117 F. 2d 972 (C. A. 2d), certiorari denied, 314 U. S. 631; *Davison* v. *Commissioner*, 81 F. 2d 16 (C. A. 2d); *Helvering* v. *Union Trust Co.*, 125 F. 2d 401 (C. A. 4th), certiorari denied, 316 U. S. 696; *Norris* v. *Commissioner*, 134 F. 2d 796 (C. A. 7th), certiorari denied, 320 U. S. 756; *Knoernschild* v. *Commissioner*, 97 F. 2d 213 (C. A. 7th); *First Trust Co. of St. Paul State Bank* v. *Reynolds*, 137 F. 2d 518 (C. A. 8th); *Mississippi Valley Trust Co.* v. *Commissioner*, 72 F. 2d 197 (C. A. 8th), certiorari denied, 293 U. S. 604; *Graff* v. *Smith*, 100 F. Supp. 42 (E. D. Pa.); *Churchill* v. *United States*, 68 F. Supp. 267 (E. D. Wis.); *Hoagland* v. *Kavanagh*, 36 F. Supp. 875 (E. D. Mich.); *Wood* v. *United States*, 20 F. Supp. 197 (W. D. Ark.); *City Bank Farmers' Trust Co.* v. *United States*, 5 F. Supp. 871 (S. D. N. Y.), affirmed on

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educated guess as what will be the first name of the man or woman who will become President of the United States in 1983". *Baker* v. *Commissioner*, 205 F. 2d 369, 370 (C. A. 2d).

[12] In addition to the cited cases, there are also cases involving charitable bequests of trust corpus subject to invasion for a private purpose in which the decisions, both before and after *Merchants Bank*, were based on the ground that the amount that would ultimately go to charity was uncertain. See, e. g., *Gammons* v. *Hassett*, 121 F. 2d 229, 233 (C. A. 1st), certiorari denied, 314 U. S. 673; *National Bank of Commerce of San Antonio* v. *Scofield*, 169 F. 2d 145 (C. A. 5th), certiorari denied, 335 U. S. 907.

other grounds, 74 F. 2d 692 (C. A. 2d); *Delaware Trust Co.* v. *Handy*, 53 F. 2d 1042 (D. Del.); *Gaston Estate* v. *Commissioner*, 2 T. C. 672; cf. *Allen* v. *First Nat. Bank of Atlanta*, 169 F. 2d 221 (C. A. 5th). With the exceptions noted hereinafter, the rule appears to have been uniformly applied except in cases involving a situation similar to *United States* v. *Provident Trust Co.*, 291 U. S. 272; that is, where the condition attached to the bequest did not exist as a practical matter as of the time of the decedent's death and the possibility of charity not taking was thus so remote as to be negligible.[14] See *Allen* v. *First Nat. Bank of Atlanta*, *supra*; *City Bank Farmers' Trust Co.* v. *United States*, *supra*; *Ninth Bank & Trust Co.* v. *United States*, 15 F. Supp. 951 (E. D. Pa.).

The basis of these decisions that conditional charitable bequests are not deductible was not that the conditional bequests could not be valued as of the decedent's death, the basis on which taxpayer has attempted to distinguish such cases (Brief in oppo-

[14] In *Farrington* v. *Commissioner*, 30 F. 2d 915 (C. A. 1st), certiorari denied, 279 U. S. 873, deduction was *denied* by a divided court in a case where the charitable bequest was contingent upon the death without issue of the decedent's daughter, who was 52 years of age at the time of the decedent's death, had never borne a child, and, according to medical testimony, was incapable of bearing a child. That decision is no longer authoritative in view of this Court's decision in *United States* v. *Provident Trust Co.*, *supra*, and the exception in the first paragraph of Section 81.46 of Treasury Regulations 105 allowing the deduction for a conditional bequest under which the possibility that charity will not take is so remote as to be negligible.

sition p. 7), but that no deduction is allowed for a charitable bequest under which it is uncertain at the decedent's death that the charities will ever receive anything. The most recent decisions are based upon the first paragraph of Section 81.46 of Treasury Regulations 105, already discussed.[15] The other decisions state the applicable law to be that a "condition precedent" to the deduction "is that there shall be in substance an absolute testamentary gift" and "When the bequest, though charitable, is at the time of death contingent and uncertain ever to take effect no deduction may be allowed";[16] that a charitable bequest is not deductible "unless the bequest is unconditionally made and the amount is definitely ascertainable at the death of the decedent";[17] that in order to justify a deduction it must appear that, at the date of the testator's death, the gift to charity "was definite and certain and not dependent upon any contingency";[18] that any gift, in order to be deductible, "must be one which is final, absolute, unconditional and irrevocable";[19] that "A contingent bequest, that is, one depending upon the happening of some event which may never take place, is not deductible";[20] that to be de-

[15] *Newton Trust Co.* v. *Commissioner, supra; Graff* v. *Smith, supra; Churchill* v. *United States, supra; cf. Allen* v. *First Nat. Bank of Atlanta, supra.*

[16] *Burdick* v. *Commissioner, supra*, p. 974; see also *Delaware Trust Co.* v. *Handy, supra.*

[17] *Helvering* v. *Union Trust Co., supra*, p. 403.

[18] *Hoagland* v. *Kavanagh, supra*, p. 877.

[19] *Knoeruschild* v. *Commissioner, supra*, p. 214; see also *Norris* v. *Commissioner supra.*

[20] *Gaston Estate* v. *Commissioner, supra*, p. 675.

ductible a charitable bequest must be "reasonably certain at the time of the testator's death", as distinguished from contingent and wholly uncertain;[21] that the test of deductibility is whether the bequest "is reasonably certain, under the circumstances prevailing at the testator's death, to vest in possession and enjoyment";[22] and that where "there is no mandatory requirement that anything shall pass from the estate to any charitable institution" the bequest lacks the "legal certainty or reality" necessary to entitle it to tax deductibility [23] because of "an entire uncertainty, at the death of testator, as to whether there would ever be any such charitable donation."[24] In some of these cases it may have been possible to place a present value upon the conditional bequest as such, as in cases involving charitable remainders conditioned upon the failure of an individual to survive a designated age or event or to have issue,[25] but the basis of the decisions obviously includes an implicit holding that, as stated in *Graff* v. *Smith, supra,* p. 43—

> It is immaterial that an actual value may be placed upon the charitable institution's right

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[21] *Davison* v. *Commissioner supra* p. 17; see also *Wood* v. *United States supra.*

[22] *City Bank Farmers' Trust Co.* v. *United States, supra,* p. 872.

[23] *First Trust Co. of St. Paul State Bank* v. *Reynolds, supra,* p. 521.

[24] *Mississippi Valley Trust Co.* v. *Commissioner, supra,* p. 199.

[25] *See Hoagland* v. *Kavanagh, supra; Wood* v. *United States, supra; Graff* v. *Smith, supra; Gaston Estate* v. *Commissioner, supra.*

> to receive the money or that some one might be willing to purchase such right (i.e. market value) or insure it.

The decisions thus amply support the statement of the Fourth Circuit in *Helvering* v. *Union Trust Co.*, *supra*, p. 403, that "The rule of law" as to conditional bequests "is free from doubt"—that "It is well established" that a charitable bequest is not deductible "unless the bequest is unconditionally made and the amount is definitely ascertainable at the death of the decedent".

Meierhof v. *Higgins*, 129 F. 2d 1002 (C. A. 2d), the authority on which the court below relied for its decision in the instant case, and *Gardiner* v. *Hassett*, 63 F. Supp. 853 (D. Mass.), appear to be the only cases in which deduction for a truly contingent bequest has ever been allowed.[26] Allowance of the deduction in *Meierhof* was even contrary to the unequivocal statement of the court below in a prior case (*Burdick* v. *Commissioner*, 117 F. 2d 972, 974, certiorari denied, 314 U. S. 631) that—

> A condition precedent to the coming into effect of a right to deduct is that there shall be in

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[26] In another old case—*United States* v. *Fourth Nat. Bank in Wichita, Kan.*, 83 F. 2d 85 (C. A. 10th), certiorari denied, 299 U. S. 575—it was stated that deduction is allowable for a contingent charitable interest if its value as of the decedent's death can be ascertained by reasonable methods or by recognized data, but deduction for the contingent interest there involved was denied because the value of the contingent interest was too speculative and because the contingency constituted a condition precedent.

> substance an absolute testamentary gift to a corporation of the nature prescribed. When the bequest, though charitable, is at the time of death contingent and uncertain ever to take effect no deduction may be allowed.

Another prior decision of the court below, *Davison v. Commissioner*, 81 F. 2d 16, was to the same effect as *Burdick*.

To follow the holding of the court below in *Meierhof*, that a contingent charitable bequest is deductible if "it has an ascertainable market value" (p. 1006) but not where accurate appraisal is impossible, has no relation to the Congressional purpose to encourage charitable gifts. The chances that a charitable donation will ultimately result may be just as remote in a case where the contingent bequest can be, as when it cannot be, valued as of the decedent's death.

In Section 812 (d) of the Code Congress "used the language of outright transfer" (*Merchants Bank*, p. 259) in providing for the deduction and over the years the statute has been continuously interpreted and applied as allowing the deduction only for bequests which represent unconditional charitable donations. The nondeductibility of conditional charitable bequests is thus a rule of long standing and the decision below, rendered on the authority of *Meierhof*, furnishes no adequate reason for overturning that rule.

C. *The evidence as to the actuarial value of the contingent charitable remainders does not in any event support the deduction.*

If the deductibility of contingent charitable bequests depended upon whether the market value of the bequest could be ascertained as of the decedent's death, as the court below held in *Meierhof*, it would still be clear that no deduction is allowable for the contingent remainders here involved. The actuarial computation accepted by the Tax Court and the court below as the amount of the deduction was no more than a guess as to value.

The charities' contingent interest, so far as here involved, consists of the right to receive one-half the principal of two trusts at the death of the survivor of the decedent's wife and daughter if the daughter (aged 27 at the decedent's death) does not leave issue or other descendants surviving her and her mother.[27] The actuarial computation accepted by the Tax Court and the court below was a computation based upon (1) the joint life ex-

[27] The charities had contingent remainder interests as to the other half of the trust principal contingent not only upon the failure of the daughter to leave issue or other descendants surviving her and her mother but upon the failure of any of certain collateral relatives of the decedent to survive the daughter and her mother. That part of the contingent bequests is excluded from consideration by reason of the fact that the actuarial computation, on the basis of which the court below allowed the deduction, assumed that there would be someone in the group of collateral relatives who would be living at the deaths of the daughter and mother, so that not more than 50 per cent of the trust principal could pass to the named charitable organizations.

pectancy of the decedent's wife and daughter, as determined from mortality tables, (2) the probability of the daughter remarrying, as determined from the American Remarriage Table published by the Casualty Actuary Society, and (3) the probability of a child being born to the decedent's daughter, as determined from a table prepared by one of the testifying actuaries in accordance with accepted actuarial principles based upon data taken from the 1940 census. In making the computation, the actuaries were stymied first of all by the fact (R. 31) that there is no recognized table in the United States covering the probability of a woman 27 years of age having issue, but that obstacle was surmounted by the preparation of the above-mentioned table by one of the actuaries (R. 25). Beyond that, however, the actuaries apparently could not even improvise. In making their computations, they assumed that, if the daughter married and became the mother of a child, the child would survive her. (R. 6-7.) Here, as in *Robinette* v. *Helvering*, 318 U. S. 184, 189, where the factors to be considered in fixing the value of a contingent reversionary interest for gift tax purposes included consideration of whether or not the donor's daughter would marry, whether she would have children, and whether they would reach the age of 21—

> Actuarial science may have made great strides in appraising the value of that which seems to be unappraisable, but we have no reason to believe from this record that even the actuarial

art could do more than guess at the value here in question.

The actuarial computation as made here, being based upon probabilities built upon probabilities, resulted in "a percentage figure" (R. 26), not even accurate, of the chances of the charities taking. Even the Tax Court termed it only an "estimate" of the value of the contingent remainders. (R. 10.) The record does not show that this "estimate" of value represented actual or market value. As representative of value, the actuarial computation was like the actuarial computation involved in *Humes* v. *United States*, 276 U. S. 487, 494—"mere speculation bearing the delusive appearance of accuracy"—and therefore does not furnish a proper basis for the deduction even if all of the decisions subsequent to *Humes* except *Meierhof* are ignored and *Humes* is interpreted as allowing deduction for a contingent remainder whose actual or market value is ascertainable as of the decedent's death.

CONCLUSION

The decision below is incorrect and should be reversed.

Respectfully submitted,

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